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## THE POSITION OF THE LAW OF TORTS IN THE SPANISH SYSTEM.

THE penal and civil codes of Spain, together with its procedural codes, its commercial and notarial codes, and its mortgage law combine to form as highly developed a system of jurisprudence as that enjoyed by any of the civilized nations of today. Under it, the people of our insular possessions have carried on an extensive domestic and foreign commerce, and have developed an organized social and political life. Our government has adopted the commendable policy of interfering as little as possible with the local laws and institutions of the Philippines and Porto Rico, it being evident that any extensive attempt to impose upon these people the principles and procedure of the common law would be attended with the most regrettable and disastrous results.<sup>1</sup>

While such a policy can only be commended, it places a double burden upon American lawyers and judges who have chosen Porto Rico or the Philippine Islands for their field of operations. They are placed under the necessity of familiarizing themselves with both systems, as their work often entails the interpretation of one in terms of the other. This difficulty is strikingly illustrated in cases which have recently arisen involving the question as to the extent to which the civil courts of Spain compel the redress of private wrongs. The most divergent opinions have been expressed, varying from the extreme of holding that, properly speaking, there is no Spanish tort law, to the opposite extreme of maintaining that the civil courts of Spain have as complete jurisdiction in matters of private wrong as have the civil courts of our own country and England.

In order to place before the reader the various views that have been taken by bench and bar concerning the matter under discussion, let me quote the different opinions expressed in recent cases where this question has arisen. In the case of *José Antonio Fernandez y Perez v. José Perez y Fernandez*,<sup>1</sup> an action of trespass on the case for the wrongful levy of an attachment was brought in the United States District Court for the District of Porto Rico. In that case the subject was thoroughly investigated by the opposing counsel, though the United States Supreme Court unfortunately did not deem it necessary to continue the discussion in order to settle the matter in dispute.<sup>2</sup> The counsel for the plaintiff in error, while disclaiming any special learning on the subject, said that it is "a well settled

<sup>1</sup> *Kepner v. United States*, 195 U. S. 100-127; *Fernandez v. Perez* (1906), 202 U. S. 80.

<sup>2</sup> See MICHIGAN LAW REVIEW, June, 1906, page 630, and *Columbia Law Review*, June, 1906, page 470, for reviews of the case.

doctrine in the Spanish jurisprudence that damages may be recovered in an exclusively *civil* action only when the injury done is of a *material* character capable of being definitely valued, and then only when it is the immediate and necessary result of the negligence or wrongful act complained of. In such a case, the damage must be 'repaired.'"<sup>3</sup> Again, "Injuries that result in damages of an indefinite and intangible nature incapable of exact valuation, such as the loss of a limb,<sup>4</sup> death of a member of the family,<sup>5</sup> impairment of health, strength, credit, dignity, honor, reputation,<sup>6</sup> and the like, are so grave as to require the criminal punishment of the author as the primary consideration and as an incident to the criminal proceeding, the person causing the injury, *if found guilty criminally*, may, apparently as a sort of additional penalty, be required to indemnify the person injured. Such injuries are included in the criminal code as acts to be punished like crimes and misdemeanors. And in order to recover damages it is absolutely necessary under the Spanish law that the author *must first be found guilty in the criminal proceeding*."<sup>7</sup>

The counsel for defendant in error in the same case based their theory on a classification of crimes obtaining in the Spanish system. From the standpoint of the person who may institute the criminal action, crimes are divided into two classes, viz., *delitos de acción pública* (crimes of public action) and *delitos de acción privada* (crimes of individual action).<sup>8</sup> They say, "In the former the public peace and order is involved and they must be prosecuted irrespective of the wishes of the party particularly injured or offended, and the proceedings may be commenced without indictment. In the latter the disposition of the party injured is permitted to have play, and in all such cases the proceedings must be based upon an indictment. In the former class of cases the civil demand must be brought in

<sup>3</sup> See Brief and Argument for Plaintiff in Error, page 26.

<sup>4</sup> See *infra*, page 143.

<sup>5</sup> See *infra*, page 143.

<sup>6</sup> This was held by the Supreme Court of Spain in the case decided December 6, 1882, Cf. *Jurisprudencia Civil*. [It may be noted that cases in the Spanish reports are cited by the date of the decision, and not by the names of the parties.] The court reasoned that honor is not capable of valuation, and in the offenses against it it is not possible to fix the amount of the damage. Great doubt is thrown upon the correctness of this opinion by Alcubilla in his commentary on Article 18 of the Penal Code, which provides that any person guilty of a crime or misdemeanor shall also be civilly liable. Alcubilla says, Vol. I, page 132, of his *Administración Española*: "Notwithstanding the absolute terms of the above obligation the Supreme Court has decided, *with very doubtful accuracy*, in our opinion, that there is no indemnity for the crime of injuria, because honor is not capable of material valuation." In this connection it may be remarked that in Spain the opinion of a great commentator like Alcubilla makes law as well as does a decision of the Supreme Court.

<sup>7</sup> Brief and Argument for Plaintiff in Error, page 29.

<sup>8</sup> Cf. Alcubilla, *Diccionario de la Administración Española*, Vol. I, page 135.

connection with the criminal action, and an acquittal of the crime charged destroys the right to recover in the civil action (Code of Criminal Procedure, Article 108); but this is not so with respect to the latter class of cases, for in this class the civil action ought not and indeed can not be brought jointly with the criminal action (Arts. 111 to 117, Code of Criminal Procedure),<sup>9</sup> and is not dependent upon its maintenance."<sup>10</sup>

In an article in the *Review of Reviews* for September, 1905, JUDGE LOBENGIER, an American Judge of the Court of First Instance in the Philippine Islands, says, "The Spanish law, it may be remarked, has no department corresponding exactly to what in the English law is designated by the term 'torts'—i. e., wrongs independent of contract and redressed by a civil action as opposed to a criminal prosecution."

The case of *Rakes v. The Atlantic, Gulf, and Pacific Company* was a case which came before the Supreme Court of the Philippine Islands in January, 1907, in which the same question was raised.<sup>11</sup> It was an action by an employee against the company to recover damages for injuries caused by the negligence of a fellow employee. The counsel for the defendant argued that the company's civil liability could be enforced only in a criminal action against the employee responsible for the injury, in which his civil liability would be fixed as incident to the penalty, and the company would then become subsidiarily liable therefor. This case is the only decision on the question by an American court that the writer has been able to find, and it is unfortunate that the facts do not render it an authority embracing the whole subject. The decision was in reality put upon the ground that the defendant company had incurred no criminal liability, but the court, speaking through TRACEY, J., goes on and says, "We should be reluctant, under any conditions, to adopt a forced construction of these scientific codes, such as is proposed by the defendant, that would rob some of these articles of effect, would shut out litigants against their will from the civil courts, would make the assertion of their rights dependent upon the selection for prosecution of the proper criminal offender, and render recovery doubtful by reason of the strict rules of proof prevailing in criminal actions."

It is the purpose of this article to examine the various provisions of the Spanish codes relating to the subject, together with commentaries and decisions thereon, in order to determine as nearly as possible the exact position of the law of private wrongs in the

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<sup>9</sup> The citations are those of counsel.

<sup>10</sup> See Additional Brief for Defendant in Error, page 25.

<sup>11</sup> Cf. Official Gazette, Manila, March 20, 1907.

Spanish system. In order to get at the matter systematically, it seems necessary to follow the classification which the Spanish codifiers have adopted, and to treat, first, of those wrongful acts which do not involve the wrongdoer in criminal responsibility, and, second, of those wrongful acts which render their authors criminally liable, in accordance with the provisions of the Penal Code. That private wrongs are divided into these two great classes seems clear from the manner in which the general subject of obligations is treated in Chapter I of Title I, Book IV, Civil Code. The purpose of this chapter is to classify obligations according to the source from which they arise, and the outline here made furnishes the basis on which the entire law of obligations is codified. The chapter runs as follows:

Art. 1088. Any obligation consists in giving, doing, or not doing something.

Art. 1089. Obligations arise from law, from contracts and quasi contracts, and from acts or omissions which are unlawful, or in which any kind of fault or negligence intervenes.

Art. 1090. Obligations derived from law are not presumed. Only those that are expressly set forth in the Code or in special laws are enforceable, and they are governed by the provisions of the law establishing them.

Art. 1091. Obligations that arise from contract have the force of law between the contracting parties, and they must be complied with according to their tenor.

Art. 1092. *Civil* obligations that arise from crimes or misdemeanors (*delitos ó faltas*) are governed by the provisions of the Penal Code.

Art. 1093. Those which arise from acts or omissions not punished by law, are governed by the provisions of Chapter II of Title XVI of this Book.

It will be seen that Article 1089 divides obligations into three great classes, viz., those that are imposed by law, which are treated in Article 1090, those that arise from contractual or quasi-contractual relations, which are treated in Article 1091, and those that find their counterpart in our law of torts, which are treated in Articles 1092 and 1093. In its treatment of the latter class, Article 1089 suggests a distinction between those acts or omissions which are "unlawful," and those in which "fault or negligence intervenes," and it seems clear from Article 1092 that the word "unlawful" in Article

1089 is used in the sense of *criminal* because Article 1092 is that article in the chapter which amplifies and explains the expression "acts or omissions which are unlawful" found in Article 1089, and Article 1092 treats of crimes and misdemeanors. Furthermore, that branch of the third class of obligations indicated by the expression "or in which any kind of fault or negligence intervenes" found in Article 1089, is amplified and explained by Article 1093 which relates to "acts or omissions not punished by law," and so that expression must refer to acts or omissions not punished by law. Furthermore, the opening article of the chapter to which we are referred by Article 1093 as containing the law concerning acts or omissions not punished by law, contains the very language of Article 1089 as follows:

Art. 1902. A person who by an *act or omission* causes damage to another, *fault or negligence intervening*, shall be obliged to repair the damage so caused.

It is also apparent that the expression "not punished by law" in Article 1093 has reference to the criminal punishment inflicted by the state, and not to the civil obligation to "repair the damage,"<sup>12</sup> otherwise why should such an expression be used in an article having for its very purpose the imposition of such a civil obligation?

The very fact that the expression "not punished by law" in Article 1093 is set over against the expression "crimes and misdemeanors" in Article 1092, together with the juxtaposition of the articles themselves, indicates that the Spanish codifiers intended to so classify the law of private wrongs. Furthermore, the comment which Falcón makes on the chapter to which we are referred in Article 1093, the greater part of which is translated elsewhere in this paper,<sup>13</sup> bears internal evidence that this learned commentator never doubted this to be the classification of private wrongs intended by the Spanish codifiers.

Following, then, this classification, let us first take up the discussion of those legal wrongs "not punished by the law." That such wrongs exist in the Spanish system seems clear from Article 1093 quoted above. They are enumerated in Chapter II of Title XVI, Book IV, Civil Code. From its title this chapter purports to deal with wrongs which consist of breaches of duty existing independently of any contractual or quasi-contractual relation,—the so-called "extra-contractual" wrongs. It may be noted before quoting the provisions that possibly no article in the code is couched in more

<sup>12</sup> See Art. 1902 *supra*.

<sup>13</sup> See *infra*, pages 142 and 144.

general terms, nor is of more constant application by the Spanish courts than the first one in the chapter, Article 1902. The provisions of the chapter are as follows:

Art. 1902. A person who by an act or omission causes damage to another, fault or negligence intervening, shall be obliged to repair the damage so caused.

Art. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom one should be responsible.

The father, or on his death or incapacity, the mother, is liable for the damages caused by the minors who live with him.

Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

Owners or directors of an establishment or enterprise are likewise liable for the damages caused by their employees in the departments of the service in which the latter may be employed or on account of their duties.

The State is liable in this sense when it acts through a special agent, but not when the damage would have been caused by the official whose duty it was to do the act performed, in which case the provisions of the preceding article shall be applicable.

Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while under their custody.

The liability referred to in this article shall cease when the person mentioned therein proves that he employed all the diligence of a good father of a family to avoid the damage.

Art. 1904. A person who pays for the damage caused by his employees may recover from the latter what he may have paid.

Art. 1905. The possessor of an animal, or the person using the same, is liable for the damages it may cause, even when said animal runs away or goes astray.

This liability shall cease only in case the damage should arise from irresistible force (*fuerza mayor*) or from the fault of the person suffering it.

Art. 1906. The owner of a game preserve shall be responsible for the damage caused by the game to neighboring estates, if he has not done what he could to avoid the increase of the same, or should he have interfered with the efforts of the owners of the said estates to hunt. .

Art. 1907. The owner of a building is liable for the damages which may result from the fall of a whole or part thereof, if it should occur through the failure to make necessary repairs.

Art. 1908. Owners are also responsible for damages caused—

(1) By the explosion of machinery which may not have been cared for with due diligence, or the igniting of explosive substances not properly secured.

(2) By excessive smoke poisonous to persons or property.

(3) By the fall of trees located in places of travel, when not caused by irresistible force (*fuerza mayor*).

(4) By emanations from sewers, drains, or depositaries of infectious substances when constructed without the precaution suited to the locality.

Art. 1909. Should the damage referred to in the two preceding articles arise from defects in construction, he who suffers them may recover from the architect, or, in a proper case, from the constructor, within the legal period.

Art. 1910. The head of a family who lives in a house, or in a part thereof, is responsible for injuries caused by objects that are thrown or fall from the same.

In commenting on this chapter Falcón says:<sup>14</sup> "But there are many acts which, without necessarily being crimes or misdemeanors (*delitos ó faltas*) because they do not directly interfere with the public order, involve their authors in responsibility because they cause injuries to third persons, and this injury has to be repaired. To call these acts 'quasi-delicts' (*causi-delitos*) involves a certain confusion of terminology which the law ought not to tolerate, because it would seem that it treats of that which in modern legal language is termed misdemeanor (*falta*), and that there are no other acts from which civil responsibility may arise, and *this is not true*.

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<sup>14</sup> Código Civil, Book IV, page 429.



Over and above the acts punished by the Penal Code as crimes or misdemeanors (*delitos ó faltas*) there are other acts of civil culpability (*culpa civil*), properly so-called, that render their authors responsible for the injuries which they have caused third persons."

Now let us examine the suggestion made by counsel for plaintiff in error in the Porto Rican case above cited, as to the character of damages recoverable. He suggests, it will be remembered, that in an independent civil action only those damages can be recovered that are capable of being definitely ascertained, such as the loss of a coat, the destruction of a carriage, or some other such material tangible injury. A careful examination of the code fails to render the limitation suggested apparent. That it is not so applied by the civil courts would seem to be clear from the following cases, which are only two from among a great number, involving the same question. In a decision of the Supreme Court at Madrid in 1894<sup>15</sup> the plaintiff, whose legs had been injured in a derailment accident, was allowed to recover damages for injuries already suffered, and which might thereafter be suffered to his health, mental state and business.<sup>16</sup> Another case decided by the same court in 1902<sup>17</sup> contains much interesting and instructive material on this whole question, in addition to being an authority against the limitation suggested as to the character of damages recoverable in a civil action. The plaintiff was dependent upon her son, who was a traveling salesman receiving an annual salary of twenty-five hundred *pesetas* from his own house and one thousand *reales* collateral commissions from other houses. He was killed in an accident caused by the derailment of the defendant's train, the derailment resulting from defective track, the inexperience of the train officials, and the excessive speed of the train. The criminal proceedings were discontinued, it appearing that the defendants were not criminally liable under these facts. The court ruled that the discontinuance did not affect the civil remedy and awarded the plaintiff 35,000 *pesetas* damages.<sup>18</sup>

It is interesting to note that in awarding prospective damages to the plaintiff, the court justified itself by Article 1106 of the Civil Code, which includes loss of profits in the indemnity allowed an obligee upon the breach of contract. This article was applied to the facts in this case with perfect freedom, though the plaintiff bore no contractual relation whatever to the defendant.

Thus it seems apparent, not only that "extra-contractual" private wrongs exist in the Spanish system in which the author is not

<sup>15</sup> Cf. *Jurisprudencia Civil*, June 27, 1894.

<sup>16</sup> See *supra*, page 137.

<sup>17</sup> *Jurisprudencia Civil*, Jan. 15, 1902.

<sup>18</sup> See *supra*, page 137.

criminally responsible, but that, in assessing the damages, the courts will include elements of perhaps as indefinite and intangible a nature as is done in our own law. Let us now examine the other branch of the question, and determine as nearly as possible just what the remedies of an injured person are where the act causing the injury involves its author in criminal responsibility also.

It is clear from the codes and commentators that the culprit is also civilly liable to the party injured. For example, Article 18 of the Penal Code provides that "Every person criminally liable for a crime or misdemeanor is also civilly liable." Also, Article 100 of the Law of Criminal Procedure provides that "A criminal action arises from every crime or misdemeanor for the punishment of the offender, and a civil action may also arise for the restitution of the thing, the repair of the injury, and indemnity for the losses occasioned by the punishable act."

Falcón, the commentator, says:<sup>19</sup> "Many of these obligations proceed from crimes or misdemeanors, for it is common learning, and unnecessary to repeat, that all penal acts involve two kinds of responsibility, the penal or public, and the civil or private. It is well known that all persons criminally responsible as author, accomplice, or accessory after the fact of a penal act are also responsible civilly for the injury caused to third persons thereby."

The next question is, how is this civil responsibility enforced? What remedies are open to a person who has been injured by an act involving its author in criminal liability? This is the point on which American lawyers, in cases involving the Spanish law on the question, have taken the most divergent views. Some have thought that there is practically no remedy independent of the criminal prosecution, others that the civil liability could be enforced in a separate civil action before the civil court in only a few special cases, and others that the civil remedy is entirely independent of the criminal action. These diverse views are curious in view of the fact that the code provisions seem clear and consistent.

It will be remembered that Article 1092 of the Civil Code quoted above<sup>20</sup> provides that the civil obligations arising from a crime or misdemeanor (*delito ó falta*) are to be governed by the provisions of the Penal Code. This would seem to include the Law of Criminal Procedure (*Ley de Enjuicimiento Criminal*), which contains many articles on the subject. An examination of these provisions impresses one with the fact that there is a much closer relation between the civil and penal liability for a crime in the Spanish law than in our

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<sup>19</sup> Código Civil, Book IV, page 429.

<sup>20</sup> See page 139.

own. This impression is strengthened when one reads the criminal reports and finds that practically every sentence is accompanied with an award of damages to the person injured. Then, too, the *Jurisprudencia Civil*, containing the reports of the civil cases which are all decided by the Supreme Court at Madrid, shows that, in comparison with our own system, very few tort cases of this nature come before the civil courts. The inference is perhaps a natural one that there is no such tort action in Spanish law, independent of the criminal action.

It seems to the writer, however, that this situation can be accounted for by the peculiar duties that are imposed on the prosecuting official under the Spanish codes. It is his duty to prosecute every criminal action which he considers to have arisen, whether or not there has been any complaint on the part of the person injured, unless the crime is one of the few that are punishable on private complaint alone.<sup>21</sup> The code also requires that he join with the demand for the punishment of the offender a demand that the culprit be compelled "to restore the thing, repair the injury, or indemnify the loss occasioned by the punishable act," unless this has been waived by the injured party.<sup>22</sup> In other words, it is his duty as a public officer to join the civil and criminal action growing out of the crime, unless the former has been expressly renounced by the injured party.

This being the situation, it is customary in Spain for a man who has been injured by an act involving its author in criminal responsibility to rely on the prosecutor to recover his damages for him. This accounts for the intimate and apparently inseparable relation of the two actions. Combine the two facts, first, that practically every crime is and must be prosecuted by the prosecutor, and, second, that he is obliged to institute the civil demand therewith, and it is not to be wondered at that the *Jurisprudencia Civil* has very few cases to offer us of a civil action in tort, wherein the defendant is criminally liable. Are we justified, however, in inferring from this that the only remedy that the Spanish system has to offer a man thus injured is in connection with the criminal prosecution, that the civil courts have no jurisdiction to grant him redress, and that he can not take

<sup>21</sup> "The prosecuting officials shall institute, in accordance with the provisions of the law, all the criminal actions they consider to have arisen (*procedente*), whether or not there be a private accuser in the cause, except those which the Penal Code reserves exclusively for private complaint." Art. 105, Ley de Enj. Crim. See *infra*, page 16.

<sup>22</sup> "The civil action must be brought jointly with the criminal action by the prosecuting official, whether or not there be a private accuser in the cause, but if the offended party shall expressly renounce his right to restitution, repair, or indemnity, the prosecuting official shall confine himself to requesting the punishment of the guilty party." Ley de Enj. Crim., Art. 108.

the initiative himself, but must wait for the prosecutor to perform his duty? It would be extraordinary if such were the case. Indeed, it seems to the writer that the Spanish law is even more liberal than our own in the choice of remedies it offers to a person so injured. The one already pointed out, viz., that of depending on the prosecutor to recover the damages as a part of the criminal proceedings, is a remedy not known in our law. Let us see what the other remedies are.

First, the injured party need not wait for the criminal action to be brought, but may institute his civil action before the civil courts at once.<sup>23</sup> But if he has waited until a criminal action has been begun he can not institute his civil action until the criminal case has been terminated by final sentence.<sup>24</sup> If he should have begun his civil suit, and the criminal action should be begun while his suit is pending, his suit would be suspended until the criminal case had been ended by final sentence.<sup>25</sup> The fact remains, however, that the injured party may institute his civil suit independently of any criminal proceeding, and may get judgment and have execution issued thereon, if no criminal action has been brought in the meantime. Conviction of the offender is not a prerequisite to the recovery of damages in a civil suit.

Second, the injured party is not bound to wait for the prosecutor to institute the penal action but may institute it himself. Indeed, any Spanish citizen not under special disability may institute it, whether he has been injured or not by the crime. The penal action, when instituted in this way, is called the "people's action" (*acción popular*).<sup>26</sup> If the injured party institutes the penal action he may join with it his claim for damages, or he may recover them in a separate civil action.<sup>27</sup> It will be presumed, however, that he has

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<sup>23</sup> " \* \* \* \* \* In other cases (than those in which the penal action has been dismissed on the merits), the party having the right to the civil action may institute it before the civil courts according to the rules of civil procedure against the one who may be obliged to restore the thing, repair the damage, or indemnify the injury suffered." *Ley de Enj. Crim.*, Art. 116.

<sup>24</sup> " \* \* \* \* \* But during the pendency of the criminal action the civil action can not be brought separately until the former is decided by final sentence." *Ley de Enj. Crim.*, Art. 111.

<sup>25</sup> "If a criminal action is brought to investigate a crime or misdemeanor, a civil action can not be instituted in the same, the proceeding being suspended, should any be pending, in the condition in which it may be, until final sentence has been pronounced in the criminal case." *Ley de Enj. Crim.*, Art. 114.

<sup>26</sup> "The penal action is public. Any Spanish citizen may institute it in accordance with the provisions of the law." *Ley de Enj. Crim.*, Art. 101. And also, "Any Spanish citizen, whether injured by the crime or not, may complain, instituting the 'people's action' established in Art. 101 of this law." *Ley de Enj. Crim.*, Art. 270.

<sup>27</sup> "The actions which arise from a crime or misdemeanor may be brought jointly or separately \* \* \* \* ." *Ley de Enj. Crim.*, Art. 111.

brought the two actions jointly, unless he expressly waives the civil action or reserves it to be brought after the termination of the penal action if that should have terminated in conviction.<sup>28</sup>

Let us digress for a moment to take under consideration the distinction suggested by counsel for the defendant in error in the Porto Rican case above noted. It will be remembered that he took the view<sup>29</sup> that if the crime is one of public action (*delito de acción pública*) the two actions must be brought jointly, but that if the crime is one of individual action (*delito de acción privada*) the two actions should be brought separately. A careful examination of the provisions of the codes on this subject fails to make apparent the authority for this position. Alcubilla enumerates these crimes of individual action in his *Diccionario de la Administración Española*, page 135, where he says: "It is the duty of the officials of the ministry to prosecute criminal actions, whether or not there be a private accuser. This rule is modified only where the law gives the exclusive right to institute the criminal action to the injured party, his creditors (*deudos*), or heirs. In such cases the penal action is private and the offender can be punished only at the instance of the offended party, as in '*el estupro*,' '*la calumnia*,' '*la injuria*,' '*el adulterio*,' '*el amancebimiento*,' '*la violación*,' and '*el rapto*,' all cases expressly provided for in Articles 449, 463 and 482 of the Penal Code, and in Articles 101-114, inclusive, of the Law of Criminal Procedure, in the form therein established." Now, of these crimes which he has enumerated, *el estupro*, *el adulterio*, *el amancebimiento*, *la violación*, and *el rapto* are crimes of a carnal nature, corresponding somewhat to our adultery, rape, etc. *La calumnia* and *la injuria* are crimes against reputation somewhat similar to our slander and libel. Yet we find the Supreme Court at Madrid, a court confined in its jurisdiction to civil actions exclusively, taking jurisdiction in cases where the wrongful act complained of bears no resemblance whatever to the crimes above mentioned. For example, in a case decided in 1882<sup>30</sup> the plaintiff had been bitten by the defendant's dog. Under the Penal Code the owners of dangerous animals are punishable for injuries they inflict. Yet this is hardly one of the crimes of individual

<sup>28</sup> "If the criminal action alone is brought, it shall be presumed that the civil action is also taken advantage of, unless the injured party renounces it or expressly reserves it to be brought after the termination of the criminal action, if then it be possible." *Ley de Enj. Crim.*, Art. 112. This provision seems to have been erroneously translated by the learned counsel for the defendant in error in the Porto Rican case. The Spanish original is, "Ejercitada solo la acción penal, se entenderá utilizada también la civil, á no ser que el dañado ó perjudicado la renunciase ó reservase expresamente para ejercitarla despues de terminado el juicio criminal, si á ello hubiere lugar."

<sup>29</sup> See *supra*, page 137.

<sup>30</sup> *Jurisprudencia Civil*, March 23, 1882.

action enumerated above. The court, in deciding this case, gave the clearest expression the writer has been able to find as to the relation between the criminal and the civil action arising out of the same wrongful act. It said: "*The party injured by an act which gives rise to a criminal prosecution may institute the penal and civil actions jointly or separately, but only in the case in which the civil action is renounced or expressly reserved will it be understood not to have been instituted with the penal action; but if they are brought jointly (as it appeared had been done in this case), the complainant will have to be content with the result of the action to which she voluntarily submitted herself, and she can not institute, in another proceeding, the civil action founded in the same cause, because the matter has already been adjudicated.*"<sup>81</sup>

Our conclusions then are:

(1) The Spanish system recognizes private wrongs arising independently of contract.

(2) It divides these wrongs into two classes, viz.:

(A) Those in which the author is criminally responsible, and (B) Those in which he is not.<sup>82</sup>

(A) Of those in which the author incurs criminal responsibility.

(1) The injured party may and usually does rely on the prosecutor to recover his damages for him, it being the prosecutor's duty to do so in the absence of express waiver or renunciation by the party injured.

(2) The injured party, in the absence of a pending criminal action, may institute a civil action himself in the civil court, and this action can be prosecuted to judgment and execution can be issued thereon without any conviction of the offender.

(3) If a penal action is begun after the civil action has thus been instituted, the civil action is suspended until the criminal action is terminated by final sentence.

(4) The injured person may himself institute the penal action, and in such cases he may and is presumed to bring the civil action with it, but he may renounce it or expressly reserve the right to bring it afterwards, if the penal action results in conviction.

(B) Of those in which the author is not criminally responsible,

<sup>81</sup> Cf. Volume 48, Jur. Civ., page 398. The Spanish original is as follows: "La parte perjudicada por un hecho que da lugar á procedimiento criminal puede ejercitar junta ó separadamente las acciones penal y civil que de él nacen, y solo en el caso de que renuncie ó se reserve expresamente la civil se entenderá no ejercitada con la penal; pero si las ejercita juntamente \* \* \* \* \* tiene que sujetarse al resultado de la acción á que se sometió voluntariamente y no puede utilizar despues en otro juicio la acción civil fundada en la misma causa ó razón de pedir, porque le obsta la cosa juzgada."

<sup>82</sup> Cf. ante, page 139.

the civil courts take exclusive jurisdiction and in the award of damages include elements of as indefinite and intangible a nature as are included by our own courts.

It would be strange indeed if in a country with a system of jurisprudence as highly developed and well adapted to the needs of the people as that of Spain, the civil courts were to deny relief to a person injured by the crime of another and were to compel him to resort to the tedious and doubtful process of a criminal trial. It is gratifying to find that such is not the case, and that any doubt which has been thrown on the question is not due to the restrictions placed on the remedy for private wrongs by the Spanish system, but rather to its liberality in that it makes such wrongs redressable at public expense, a fact that Spanish people are accustomed to take advantage of. The American courts in our insular possessions can not be accused of making innovations on the customs and institutions of the people whose laws they administer when they recognize and redress private wrongs in civil actions.

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